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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-247

NACIREMA OPERATING COMPANY, INC., and
LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners

v.

JERRY C. OOSTING, DEPUTY COMMISSIONER,
BUREAU OF EMPLOYEES' COMPENSATION,
DEPARTMENT OF LABOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WALTER B. MARTIN, JR.
VIRGINIA NATIONAL BANK BUILDING
One Commercial Place
Norfolk, Virginia 23510
Counsel for Petitioners

PERRY OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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JERRY C. OOSTING, DEPUTY COMMISSIONER,
BUREAU OF EMPLOYEES' COMPENSATION,
DEPARTMENT OF LABOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nacirema Operating Company, Inc., and Liberty Mutual Insurance Company, by their counsel, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on March 16, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals (App. C, *infra*, p. 9a) is reported at 330 F.Supp. 1034.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1972, Appendix *infra* p. 9a. An order extending the time for filing a petition for Writ of Certiorari to and including August 13, 1972 was entered on June 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTION PRESENTED

Whether the employer of a longshoreman making a recovery against a third party is entitled to a credit against compensation due longshoreman under 33 USC 933 equal to the amount of the judgment obtained by the longshoreman against the third party or if the employer is only entitled to a credit in the amount of the judgment obtained less the longshoreman's attorneys fees and expenses.

STATUTE INVOLVED

Title 33, section 933(f) USC entitled "Compensation for Injuries where Third Persons are Liable," provides:

> "If the person entitled to compensation institutes proceedings within [six months after an award] the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person."

STATEMENT OF FACTS

Longshoreman Allmond filed suit against shipowner to recover damages for personal injury. Shipowner impleaded Allmond's stevedore employer Nacirema Operating Company, Inc., as a third party defendant. All parties were represented in the aforementioned litigation by their own counsel. After the filing of many pleadings and considerable preliminary trial work, a compromise settlement was reached prior to trial of $112,170.00. Insurance carriers lien for compensation was $2,170.00 and medical expenses incurred amounted to $8,123.55 for a total lien of $10,293.55. Longshoreman Allmond paid his attorney $37,025.35 as an attorney's fee and expenses, leaving a balance to him of $64,851.10. The Deputy Commissioner held that Nacirema and its insurance carrier were entitled only to a credit for the actual amount received by the claimant longshoreman. Nacirema and its insurance carrier contended in the District Court below that under 33 USC 933(f) they were entitled to a credit for the amount recovered by the claimant longshoreman against the third party. The District Court in its memorandum opinion (App. A, *infra,* p. 1a) agreed. The Fourth Circuit Court of Appeals in its opinion (App. C, *infra* p. 9a) reversed the decision of the District Court below and reinstated the award of the Deputy Commissioner.

REASON RELIED ON FOR ALLOWANCE OF WRIT

I. The Decision Below Is Contrary to the Very Wording of Federal Statute 33 U.S.C.A. Section 933(f).

Title 33, section 933 U.S.C.A. entitled "Compensation for Injuries where Third Persons are Liable", provides in subsection (f) as follows:

> If the person entitled to compensation institutes proceedings within the period described in sub-

> section (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the secretary determines is payable on account of such injury or death *over the amount recovered against such third person.* (Emphasis added.)

As stated by the District Judge the act makes no provision for the employer to pay his proportionate share of attorney's fees and expenses incurred by the claimant longshoreman. The act does specifically state, however, that the employer is only liable for compensation "*over the amount recovered against such third person*".

The statute in question clearly states in simple English that the employer shall be liable *only* for an amount "*over the amount recovered against such third person*". This is not a complicated or involved sentence. It is simple English that even the Deputy Commissioner should be able to understand. It means simply what it says. Nothing more, nothing less.

The Court below passes over the clear and unequivocal language of the statute itself by simply stating that the act contains no mention of attorney's fees and legal expenses when an employee brings suit.

The Court below then attempts to reinforce its position with the argument that its ruling assures the injured worker at least a statutory compensation to which he would have been entitled had he not brought suit. The fallacy of this argument rests in the fact that the employee would have received his full entitlement under the act if he had not chose of his own free will to hire an attorney and bring suit against the third-party. But the argument of the Court below falls on a further ground and that is that in this case and in

similar cases where the employee sues a third-party and receives a lump sum judgment or settlement, he has in hand funds which can be invested and return to him a steady income often in excess of the amount that he would have been entitled to under the act.

For example in this particular case the employee actually received in hand a lump sum payment of $65,000.00. If invested at 5% this principal would deliver to the employee for the rest of his life an amount equivalent to the maximum weekly payments of $70.00 to which he would have been entitled under the act if he had not brought suit. In addition if the employee should die tomorrow, his estate would have the principal amount to distribute or reinvest.

The Court below totally disregards this most important fact.

The employee by employing his own attorney has gained these most definite advantages and it is not unreasonable that he should bear the cost of paying his attorney for the same. Not only would it be contrary to the statute to require the employer to bear this expense, but it would certainly give to the employee an unjust award and would in short encourage litigation.

II. The Court of Appeals' Decision Below Is In Conflict With the Decision of Fifth Circuit Court of Appeals in the Matter of Haynes v. Rederi a/s Aladdin 362 F.2d 345 (1966).

The Court below in its opinion recognizes that its decision is in conflict with the Fifth Circuit Court of Appeals' decision in *Haynes v. Rederi A/S ALADDIN,* 362 F.2d 345 (1966). See footnote 10 in opinion of Court below.

The question present in this case is simple, *i.e.*, whether a compensation carrier is entitled to a future

credit for the entire amount recovered by a longshoreman or only to the amount recovered less the longshoreman's attorney's fee.

The Court below found that:

> ". . an employee's reasonable attorney's fee and expenses must be deducted from the amount recovered. . . . to determine his deficiency award."

Haynes held in effect that where the third-party stevedore employer employed its own attorney and was in fact at odds not only with the shipowner but the longshoreman plaintiff, then the longshoreman should bear his own attorney's fee. Though this did not concern a matter of a deficiency award, the principle involved is the same. Thus in Haynes, *supra* the Court stated:

> The "age-old equitable principle" to which the Voris court refers and upon which Melvin is based, applies only "when the circumstances are such as that parties sought to be held liable for fees can be said to have either expressly or impliedly accepted the attorneyship and its benefits", and "normally a mere incidental advantage resulting to a fund by reason of adverse litigation furnishes no basis for charging the attorney's fees of one of the parties against the fund." — Plainly it is not intended to, nor does it apply to a case such as now before us. — In fact it (the stevedore) employed its own attorneys to preserve its position during this litigation and these counsel represented it and actively asserted its rights throughout the trial. Thus TEIA's (the stevedore) own counsel were responsible, at least in large part, for the reimbursement allowed it. This apparently distinguishes Melvin; and it glaringly reveals that to grant appellants attorneys a fee from TEIA's reimbursement would be wholely unfair and unwarranted in this case.

In the case at bar the record is clear that the stevedore was represented by counsel, that the matter proceeded with all counsel taking part, and at no time did the stevedore expressly or impliedly accept the attorneyship for the plaintiff's attorney.

CONCLUSION

For the reasons assigned herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WALTER B. MARTIN, JR.

WALTER B. MARTIN, JR.
Suite 2050
Virginia National Bank Building
Norfolk, Virginia 23510

APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 482-70-N

NACIREMA OPERATING COMPANY, INC.
and
LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiffs,

v.

JERRY C. OOSTING, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, Fifth Compensation District, *Defendant.*

Opinion

Nacirema Operating Company, Incorporated (Nacirema) and Liberty Mutual Insurance Company (Liberty) instituted this proceeding pursuant to the provisions of Title 33 § 901 U.S.C.A., and subsequent sections, more particularly § 921(b), known as the Longshoremen's and Harbor Workers' Compensation Act, to modify, suspend or set aside, in whole or in part, an award entered against them by defendant. The order appealed from fixed the amount of the additional deficiency compensation due Robert M. Allmond under the provisions of the aforesaid Act, after credit on account of recovery against a third party tortfeasor. The order appealed from credited against the award the amount of the third party recovery less the amount of the attorney's fee and expenses of litigation incurred by employee. The employer and insurer plaintiffs assert they are entitled to credit for the total recovery without deduction for such expenses of the suit.

The facts are not in dispute. Allmond filed suit in this Court against "El Yam Bulk Carriers (1967) Ltd., owner

of the vessel. The owner impleaded Nacirema as a third party defendant. Allmond recovered a compromise settlement of $112,170.00. The insurance carrier's lien for compensation was $2,170.00, and medical expenses incurred amounted to $8,123.55, for a total of $10,293.55. Allmond paid his attorney $37,025.35 as attorney's fee and expenses, leaving a balance to Allmond of $64,851.10. Plaintiffs assert they are entitled to have the sum of $101,876.45 credited against the award, rather than the net sum after attorney's fee and expenses of $64,851.10.

Title 33, § 933 U.S.C.A. entitled "Compensation for injuries where third persons are liable," provides, in part, that where an injured party determines a third party is liable for his injuries, he may accept compensation and also bring his action against such third party, if action is instituted within six months after the award. If action is not brought by the employee within the six months period, the employer may bring the action.[1] Sub-section (e) of that section provides for distribution of any recovery when the employer brings the action. Sub-section (f) provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death *over the amount recovered against such third person.*
>
> (Emphasis added)

The Act makes no provision for the employer and/or insurance carrier to pay its proportionate share of the litigation expenses when suit is instituted by the injured employee against the third party. The Act gives the employer and/or insurance carrier a statutory lien for the amount of

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[1] Subsection (h) provides that where the employer is insured and the insurance carrier has assumed the payment of compensation, it is subrogated to the rights of the employer.

compensation benefits, and where the employee institutes suit and perfects a recovery, "the employer shall be required to pay as compensation * * * a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury * * * over the amount recovered against such third person." The statute refers to the amount recovered against such third person, not the sum ultimately received by the employee.

The question here in issue was before the Court in *Ballwanz* v. *Jarka Corporation of Baltimore*, 382 F.2d 433 (4th Cir. 1967); *Haynes* v. *Rederi A/S ALADDIN*, 362 F.2d 345 (5th Cir. 1966); *Riddick* v. *Rederi A/B FREDRIKA*, 271 F. Supp. 360 (E.D. Va. 1967); *Callaghan* v. *Eastern Air Lines, Inc.*, 286 F.Supp. 8 (E.D. Va. 1968); *Russo* v. *Flota Mercante, etc.*, 303 F.Supp. 1404 (S.D. N.Y. 1969); *Oleszczuk* v. *Calmar Steamship Corp.*, 163 F.Supp. 370 (D.C. Md. 1958). *See also Davis* v. *United States Lines*, 253 F.2d 262 (3d Cir. 1958); *Ashcraft and Gerel* v. *Liberty Mutual Insurance Co.*, 343 F.2d 333 (D.C. Cir. 1965).

In the *Ballwanz case, supra*, Chief Judge Haynsworth was dealing with "the right of an attorney for an injured longshoreman to a fee at the expense of the stevedore under the * * * Act." At page 436, he said:

> The quite evident purpose of the statute was to assure the injured longshoreman that he would receive not less than the medical benefits and compensation prescribed by the Act. Provision was made for a potential dividend or bonus to him through a third party action, *but his interest clearly extends only to the excess over the employer's disbursements under the Act and his related litigation expenses.* It is both reasonable and consistent with the statutory purpose to require that the longshoreman's lawyer have his compensation measured by and payable out of that interest when he proceeds without leave of the employer.
>
> This is particularly true in the usual situation when the third party claim is against the ship and the ship is almost certain to have or assert a claim of indemnity

against the stevedore. In those cases, the longshoreman's action is adverse and antagonistic to the stevedore. The stevedore must appear in opposition by its own counsel, and the longshoreman's lawyer has no interest in and is incapable of faithful representation of the employer's interest. In that situation, counsel for the longshoreman ought not to have his fee measured by or payable out of any incidental credit received by the stevedore as a result of the litigation. (Emphasis added)

For the reasons set out above the Court "concluded that the stevedore's credit for compensation disbursements is not chargeable with any contribution to the fees of the longshoreman's lawyers." [382 F.2d 437].

In the *Riddick case, supra,* there was a verdict in favor of the longshoreman for $1,500.00. The insurance carrier for the stevedore sought satisfaction of its lien of $1,821.78, which represented sums paid under provisions of the Act. Riddick's attorneys asserted a lien for their fees. The Court held "that the lien of the compensation insurance carrier takes precedence over that of plaintiff's attorney." There, like in the case at bar, there was no suggestion plaintiff's attorneys were maintaining the action for the benefit of the stevedore or its compensation carrier. They employed their own lawyer.

In the *Callaghan case, supra,* the Court pointed out that the "plaintiff knew or should have known at the time she [he] instituted the third-party action that she [he] was liable for the full repayment of the amount she [he] had received as workmen's compensation benefits if she [he] were successful in her [his] third-party action." The Court further pointed out that the fact plaintiff agreed to pay her lawyers one-third of any recovery did not bind the insurance carrier. Plaintiff "cannot recoup any of the legal expenses thus incurred from the insurance carrier." [286 F.Supp. 9]

As was pointed out in *Haynes* v. *Rederi, supra,* Title 33 § 933, U.S.C.A. "makes it clear that the compensation insurer shall recover in full [2] its payments from the total [3] recovery obtained by the injured workman from a third party defendant, regardless of what that recovery replaces or is termed by the court." [362 F.2d 350]. And continuing in the opinion, the Court said, we "hold TEIA [4] is entitled to reimbursement from all damages awarded appellant [5] in his third party suit." [362 F.2d 350].

In *Ashcraft and Gerel* v. *Liberty Mutual Insurance Company,* 343 F.2d 333 (D.C. Cir. 1965),[6] there was an attempt to recover an attorney's fee from a workmen's compensation insurance carrier for pressing an injured employee's claim against a third party. The Court pointed out that in enacting the Longshoremen's and Harbor Workers' Act, and the provisions as to who might bring suit, Congress said that, "if the employee sued, the employer's compensation liability would be restricted to any excess of that liability over the amount recorded." [7] [343 F.2d 336].

Lastly, in the *Russo case, supra,* the longshoreman recovered a judgment for $8,500.00 against the shipowner. The compensation insurance carrier for the stevedore sought to recover the total award to be applied to the sum of $10,625.95 paid by it pursuant to the provisions of the Longshoremen's and Harbor Workers' Act. Plaintiff's attorney opposed the motion, asserting he had a prior lien for attorney's fee and that such fee must be paid out of the

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[2] *In full* italicized.

[3] *Total* italicized.

[4] The insurance carrier.

[5] Injured longshoreman.

[6] Chief Justice Burger, then Circuit Judge, was a member of the panel.

[7] Court probably meant "recovered."

$8,500.00 recovery before the claim of Michigan Mutual, the liability carrier, attaches. The Court said:

> The attorney, however, was retained exclusively to secure a benefit for plaintiff, the injured longshoreman who by instituting suit, obviously hoped to secure a recovery over and above the minimum compensation guaranteed and already paid to him as a ward of Admiralty under the Longshoremen's Act. In undertaking and prosecuting the action, his attorney was aware not only of the carrier's lien but of the possibility that the suit might result in a recovery over against plaintiff's employer, the third-party defendant. It cannot be said that he undertook to render services for the benefit of the employer or its compensation carrier, since their interests were adverse to those of plaintiff and they in fact opposed plaintiff's suit, thereby negating any inference that they considered plaintiff's attorney to be acting for them. To permit plaintiff's attorney to recover his contingent fee claim would be to reward him, even though he has been unsuccessful in benefitting his only client, at the expense of the carrier which has already paid out the minimum compensation guaranteed to plaintiff under the Longshoremen's Act. Accordingly, the attorney's claim of priority must be rejected. Fontana v. Pennsylvania R.R. Co., supra; Davis v. United States Lines, 253 F.2d 262 (3d Cir. 1958); Haynes v. Rederi A/S Aladdin, 362 F.2d 345 (5th Cir. 1966); Riddick v. Rederi A/B Fredrika, 271 F.Supp. 360 (E.D.Va. 1967).

The defendant relies strongly on *Voris* v. *Gulf-Tide Stevedores,* 211 F.2d 549 (5th Cir. 1954), cert. denied 348 U.S. 823, and *Strachan Shipping Co.* v. *Melvin,* 327 F.2d 83 (5th Cir. 1964). But the Fifth Circuit in *Haynes* v. *Rederi A/S ALADDIN, supra,* referring to *Voris* and *Melvin* cases said that in those cases it had honored the age-old equitable principle that one who creates a fund for the benefit of another was entitled to reimbursement for reasonable costs incurred. The Court then said that such principle applies only "when the circumstances are such as that parties sought to be held liable for fees can be said to have either

expressly or impliedly accepted the attorneyship and its benefits," and "normally a mere incidental advantage resulting to a fund by reason of adverse litigation furnishes no basis for charging the attorney's fees of one of the parties against the fund." [362 F.2d 351]. In the *Haynes case,* the Court pointed out that the liability insurance company had employed its own counsel to preserve its position during the litigation, and that such counsel did actively assert its rights. The same situation exists in the case at bar. The reasoning in the *Haynes case* followed much of the dissenting opinion of Chief Judge Brown in the *Melvin case.* Chief Judge Haynsworth pointed out in the *Ballwanz case, supra,* that the position of the majority in *Strachan Shipping Co.* v. *Melvin, supra,* "runs counter to the entire course of decision elsewhere" and furnishes no basis for following it, in view of the "subsequent decision of a different panel of the Fifth Circuit in Haynes v. Rederi A/S Aladdin."

Here, the third party was represented by its own counsel who participated in the proceedings. At no time did the stevedore, either expressly or impliedly, accept the attorneyship or services of employee's counsel. Here the action by employee-longshoreman was against the ship, and the ship sought indemnity from the stevedore. The action of the longshoreman was adverse and antagonistic to the stevedore. The stevedore was required to appear with its own counsel in opposition. The longshoreman's attorney certainly did not represent the stevedore, nor did he have any interest in representing the stevedore. He could not have in good faith done so. Being responsible to bear the cost of its own defense, why should the stevedore also have to bear the cost of plaintiff's representation.

Defendant's motion for summary judgment is denied. All parties agree that no further facts or exhibits are to be presented herein, nor is any further argument desired. Plaintiffs are entitled to the relief sought, namely, to have the compensation order of the Deputy Commissioner

amended in accordance with this opinion. Counsel will within fifteen days present a proper order to accomplish such purpose.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
January 20th, 1971.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 482-70-N

Nacirema Operating Company, Inc.

and

Liberty Mutual Insurance Company,
Plaintiffs,

v.

Jerry C. Oosting, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, Fifth Compensation District, *Defendant.*

Final Order

This cause having come on to be heard on December 10, 1970 on Defendant's Motion for Summary Judgment, and the Court after due deliberation having rendered its Memorandum Opinion on January 20, 1971, which Memorandum Opinion is made a part of the record in this cause and to which reference is made herewith, and for the reasons set out therein, it is

Adjudged, Ordered and Decreed that the Motion for Summary Judgment filed by defendant be, and the same is, hereby denied, and the Compensation Order of the Deputy Commissioner is hereby amended in accordance with the

aforementioned Opinion of this Court, to which ruling the defendant, by its counsel, doth except and object.

/s/ RICHARD B. KELLAM
United States District Judge

Norfolk, Virginia
February 9th, 1971

Seen:
/s/ WALTER B. MARTIN, JR.
Counsel for Plaintiff

Seen and objected to:
/s/ JAMES R. OAST
Counsel for Defendant

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1639

NACIREMA OPERATING COMPANY, INC., and LIBERTY MUTUAL INSURANCE COMPANY, *Appellees*

v.

JERRY C. OOSTING, Deputy Commissioner, Bureau of Employees' Compensation, Department of Labor, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.
Richard B. Kellam, District Judge.

(Argued 1/6/72 Decided March 16, 1972.)

Before CRAVEN and BUTZNER, Circuit Judges, and YOUNG, District Judge.

Leavenworth Colby, Special Assistant Attorney General, (L. Patrick Gray, III, Assistant Attorney General, and Alan S. Rosenthal, Attorney, Department of Justice, on brief) for appellant; Walter B. Martin, Jr., (Vandeventer, Black, Meredith, and Martin on brief) for appellees.

BUTZNER, Circuit Judge:

The deputy commissioner appeals from an order of the district court which reduced a longshoreman's deficiency award by the amount of the fee he paid an attorney to represent him in an action against the ship on which he was injured. Nacirema Operating Co., Inc. v. Oosting, 330 F. Supp. 1034 (E.D. Va. 1971). We reverse because the decision is inconsistent with the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* (1970), as amplified by its legislative history, and because it is contrary to the decisions of other courts and deputy commissioners.

Robert M. Allmond, a longshoreman employed by Nacirema Operating Co., Inc., was severely and permanently injured while working on board a vessel at Norfolk, Virginia. In accordance with the Act, his employer promptly began payment of compensation and medical expenses resulting from the injuries.[1] These payments continued until Allmond settled an action he had instituted against the shipowner, as permitted by § 33(a) of the Act. From this settlement, Allmond reimbursed Nacirema for the compensation payments he had received and the medical expenses it had paid on his behalf. He also paid his attorney $37,000 for fee and expenses, leaving a net recovery of approximately $65,000. Because the amount of the settlement of Allmond's case against the shipowner was less than the present value of his compensation entitlement, he sought deficiency compensation under § 33(f).[2]

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[1] 33 U.S.C. §§ 907, 914.

[2] Section 33(f) of the Act, 33 U.S.C. § 933(f), provides:

> "If the person entitled to compensation institutes proceedings within [six months after an award] the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person."

At the hearing before the deputy commissioner, the parties agreed that the amount Allmond paid to discharge Nacirema's lien for past benefits should be deducted from the sum he received on account of his injuries in computing the company's credit against future compensation.[3] Therefore, the only issue is whether the phrase in § 33(f), "the amount recovered," means Allmond's gross recovery less reimbursement for benefits paid, or whether it should be construed as the net proceeds actually received by him after also deducting his reasonable attorney's fee and expenses. Nacirema presented evidence that it had been impleaded as a third party defendant by the shipowner, it had employed its own counsel, and it had contributed to the settlement as indemnitor of the ship. It contended that since its position in the suit was adverse to Allmond's, it should not be burdened with his attorney's fee and expenses. It, therefore, claimed as a credit Allmond's recovery from his action against the ship, without deduction of the sum he paid his attorney. Computed in this fashion, Nacirema's credit against future compensation would approximate $102,000. Allmond asserted that only his net proceeds, after deducting the $37,000 he paid his lawyer, was available as a credit. By his computation the credit would be roughly $65,000.

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[3] Section 33(e) of the Act, which governs the distribution of the recovery against a wrongdoer when the employer institutes the action, specifically provides for reimbursement to the employer of all compensation and medical payments that he has advanced. There is no counterpart of this statutory lien in § 33(f) which deals with an employee's suit against a wrongdoer. To forestall double recovery by the employee, an equitable lien patterned after the § 33(e) lien has been judicially imposed on recoveries in suits brought by employees. *See e.g.*, Fontana v. Pennsylvania R.R., 106 F.Supp. 461, 462 (S.D.N.Y. 1952), *aff'd sub nom.* Fontana v. Grace Line, Inc., 205 F.2d 151 (2d Cir.), *cert. denied*, 346 U.S. 886 (1953).

The deputy commissioner agreed with Allmond and credited Nacirema with only the net proceeds.[4] The practical effect of the ruling is that Nacirema must resume compensation payments to Allmond after about 17 years. Under Nacirema's computation it would have been relieved of payments until the expiration of roughly 27 years. Should Allmond expend the net proceeds he received in his action against the ship at the rate of his weekly compensation entitlement, he will exhaust the sum he received in about 17 years, and under Nacirema's theory he would be without the benefit of either his settlement or compensation for 10 years.[5]

Nacirema appealed to the district court which accepted the deputy commissioner's findings of fact, but differed in its interpretation of the Act. The court held that "[t]he statute refers to the amount recovered against [the shipowner], not the sum ultimately received by the employee." 330 F.Supp. at 1035. Accordingly, it modified the deputy

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[4] The deputy commissioner stated:

> ". . . That as a result of the compromise settlement effected between the claimant and the third party or parties said to have been responsible for his injury, the claimant has realized the sum of $110,000.00, in addition to the sum of $2,170.00, in compensation paid on account of temporary total disability by the employer and insurance carrier for a gross recovery of $112,170.00; that the attorney's fee of $36,487.33, legal expenses of $538.02, the insurance carrier's lien for compensation in the amount of $2,170.00 and medical expenses in the amount of $8,123.55 which were incidental to the third-party settlement amount, to $47,318.90; that the claimant has netted the amount of $64,851.10 ($112,170.00 less $47,318.90) which sum is a prepayment of compensation accruing the claimant under this award."

[5] Of course, under either the deputy commissioner's award or Nacirema's theory of computation, Nacirema's obligation for future compensation will end if Allmond were to die within 17 years. Moreover, this time is subject to adjustment if Allmond's injuries require additional medical treatment, or in the unlikely event that he should be restored to health.

commissioner's deficiency award by allowing Nacirema the full amount of the settlement, without deduction for attorney's fee and legal expenses, as a credit toward future payments.

The Longshoremen's Act affords a worker the right to sue the person responsible for his injury if the wrongdoer is neither his employer nor a fellow employee. Since its enactment, the statute has been interpreted to provide that the "employer . . . remains liable for any amount by which the recovery against the [wrongdoer] falls short of the prescribed compensation." Chapman v. Hoage, 296 U.S. 526, 528 (1936). Before 1959, acceptance of an award of statutory compensation operated as an assignment to the employer of the cause of action against the person liable for the injury. Amendments to the Act in 1959 allowed a worker to sue after accepting a compensation award, provided he does so within six months.[6] The amendments, however, were not intended to change the basic concept of the Act, which secures at least the full amount of statutory compensation for the injured worker. The legislative history emphasizes that when a longshoreman sues a wrongdoer, the employer is to be benefited only out of the net proceeds of the recovery.[7]

Section 33(e) provides that when an employer sues the person responsible for injury to the employee, the employer's legal expenses and attorney's fee shall be deducted before any part of the recovery is paid to the employee.

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[6] Act of Aug. 18, 1959, Pub. L. No. 86-171, 73 Stat. 391, *amending and codified at* 33 U.S.C. § 933.

[7] S. Rep. No. 428, 86th Cong., 1st Sess. 2 (1959), reprinted in 1959 U.S. Code Cong. & Ad. News 2135, states in part:

> "Although an employee could receive compensation under the act and for the same injury recover damages in a third-party suit, he would not be entitled to double compensation. The bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery. . . ."

The Act, however, contains no mention of attorney's fee and legal expenses when an employee brings the suit. To fill this void, deputy commissioners and courts, both before and after the 1959 amendments, uniformly have held that an employee's reasonable attorney's fee and expenses must be deducted from the amount recovered in an action at law to determine his deficiency award.[8] These decisions effectively implement the congressional policy of assuring an injured worker at least the statutory compensation to which he would have been entitled had he not brought suit.

Neither the Act nor the decisions interpreting it create an exception for the stevedore which finds itself adverse to its longshoreman because the shipowner has joined it as a third party defendant. The shipowner's right to indemnification from the stevedore, sanctioned in 1956,[9] is of course well known to Congress and the Bureau of Employees' Compensation. Under settled principles of law, we cannot lightly put aside the agency's consistent interpretation of the Act by making an exception which neither Congress nor the Bureau recognizes. NLRB v. United Insurance Co., 390 U.S. 254, 260 (1968); Udall v. Tallman, 380 U.S. 1, 16 (1965).

Nacirema relies on Ballwanz v. Jarka Corp., 382 F.2d 433 (4th Cir. 1967), but that case is inapplicable. There we held that when the amount recovered in an action against the shipowner is distributed, the stevedore is entitled to reimbursement of its equitable lien for medical expenses and

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[8] Stark v. Shell Oil Co., 450 F.2d 994 (5th Cir. 1971); Voris v. Gulf Tide Stevedores, Inc., 211 F.2d 549 (5th Cir.), *cert. denied*, 348 U.S. 823 (1954); Independent Stevedore Co. v. Stocker, 292 F.Supp. 354 (D. Ore. 1968); Seaboard Marine Service Corp. v. Quigley, 159 F.Supp. 27 (S.D.N.Y. 1958), *aff'd*, 266 F.2d 822 (2d Cir.), *cert. denied*, 361 U.S. (1959); *see also* Strachan Shipping Co. v. Melvin, 327 F.2d 83, 86 (5th Cir. 1964) (Brown, J., dissenting).

[9] Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).

compensation already paid without deduction of any part of the longshoreman's attorney's fee. Judge Brown has lucidly explained the difference between the allocation of an attorney's fee in distribution cases, such as *Ballwanz*, and the computation of the employer's credit in deficiency cases, such as this. Strachan Shipping Co. v. Melvin, 327 F.2d 83, 86 (5th Cir. 1964) (dissenting opinion). The basic difference is that the *Ballwanz* rule for distributing a recovery does not deprive a longshoreman of compensation due him under the Act as would acceptance of Nacirema's attempt to apply this rule in the computation of a deficiency award. Indeed, Allmond faithfully followed the rule when he fully reimbursed Nacirema for its outlay of medical expenses and compensation. *Ballwanz* is in harmony with every case, save one, which has directed the distribution of recoveries,[10] and nothing in this opinion trenches on its authority.

The judgment is reversed and the case is remanded for reinstatement of the deputy commissioner's award.

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[10] *E.g.*, Haynes v. Rederi A/S Aladdin, 362 F.2d 345 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967); Davis v. United States Lines Co., 253 F.2d 262 (3d Cir. 1958); Petition of Sheffield Tankers Corp., 222 F.Supp. 441 (N.D. Cal. 1963); Fontana v. Pennsylvania R.R., 106 F. Supp. 461. (S.D. N.Y. 1952), *aff'd sub nom.* Fontana v. Grace Line, Inc., 205 F.2d 151 (2d Cir.), *cert. denied*, 346 U.S. 886 (1953); *contra*, Strachan Shipping Co. v. Melvin, 327 F.2d 83 (5th Cir. 1964).

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-247

NACIREMA OPERATING COMPANY, INC., and LIBERTY MUTUAL INSURANCE COMPANY, PETITIONERS

v.

JERRY C. OOSTING, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This is an action under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.*, brought by an employer and its insurance carrier to set aside a compensation order entered by the respondent Deputy Commissioner in favor of an injured longshoreman.

The longshoreman settled a civil action against a ship-owner as a third party tort-feasor, in which the employer was impleaded as a third party defendant, for $112,170. Of this amount, petitioners received $10,293.55 as reimbursement for the medical expenses and compensation already incurred, and the longshoreman's attorney received $37,025.35. The Deputy Commissioner in the instant case found that the longshoreman was totally disabled by his work-related injury, and awarded him continuing compensation payments of $70 a week. In accord with the direction of 33 U.S.C. 933(f) that the "amount recovered against" a third party tortfeasor is to be deducted from his compensation under the statute, the Commissioner credited $64,851.10, the net amount recovered by the longshoreman in his civil suit, against the award.[1]

The district court set aside the Commissioner's order, and credited $110,000 against the award, holding that the "amount recovered against" the tortfeasor was the gross amount, less reimbursement to petitioners for the benefits previously paid, but not less the longshoreman's attorney's fees. The court of appeals reversed and reinstated the Deputy Commissioner's award (Pet. App. C), holding the district court's decision inconsistent with the Act and its legislative history and contrary to past decisions of the courts and other Deputy Commissioners.

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[1] In effect, weekly compensation payments must be made by petitioners beginning in about 17 years (Pet. App. 12a).

2. The holding below is correct and further review is unwarranted. In 1959, Congress amended the Longshoremen's and Harbor Workers' Compensation Act to permit the injured longshoreman himself to sue the person responsible for his injury if the tortfeasor is neither his employer nor a fellow employee. Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391.[2] The legislative history of these amendments shows that Congress did not intend that the injured longshoreman would receive double compensation from his suit but rather that "an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery [in a tort suit]." S. Rep. No. 428, 86th Cong., 1st Sess., p. 2. As the court of appeals held (Pet. App. 13a), "The amendments * * * were not intended to change the basic concept of the Act, which secures at least the full amount of statutory compensation for the injured worker."

The decision below, upholding the deduction of an employee's reasonable attorney's fees and expenses from the gross amount recovered, is correct. The decision properly implements the legislative policy of insuring that the injured worker will receive the full

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[2] This Act, *inter alia*, amended 33 U.S.C. 933(f), which formerly permitted only the employer to sue the third party. However, there was no change in the language directing payment by the employer of the excess of the statutory award "over the amount recovered against such third person," and thus no indication of congressional intent to change the settled administrative and judicial interpretation of that phrase (Pet. App. 13a-14a).

amount of statutory compensation during the period of his industrial disability and is in accord with the decisions of other courts. See *Stark* v. *Shell Oil Co.*, 450 F. 2d 994 (C.A. 5); *Voris* v. *Gulf-Tide Stevedores, Inc.*, 211 F. 2d 549 (C.A. 5), certiorari denied, 348 U.S. 823; *Independent Stevedore Co.* v. *Stocker*, 292 F. Supp. 354 (D. Ore.); *Seaboard Marine Service Corp.* v. *Quigley*, 159 F. Supp. 27 (S.D.N.Y.), affirmed, 266 F. 2d 822 (C.A. 2), certiorari denied *sub nom. Peterson* v. *Seaboard Marine Service Corp.*, 361 U.S. 830.[*]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1972.

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[*] Petitioners' claim that this decision is inconsistent with those in other circuits ignores the clear distinction in the cases between deficiency judgments, such as this and the ones cited above, and distribution cases, such as those cited by petitioners (and collected in footnote 10 of the opinion below at Pet. App. 15a), in which the courts have held that the equitable lien of the employer and his insurance carrier for reimbursement of payments already made for medical and related compensation has priority over the lien of the employee's attorney for his reasonable fee. The instant case is not inconsistent with the distribution cases, since the employer and insurer have been repaid in full for their medical and compensation expenses.

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